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IN THE

Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF SPRINT COMMUNICATIONS COMPANY L.P. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 201(b) of the Communications Act of 1934, 47 U.S.C. § 201(b), creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, *Amicus Curiae* Sprint Communications Company L.P. is a limited partnership and is indirectly wholly-owned by Sprint Nextel Corporation. The partners of Sprint Communications Company L.P. are: U.S. Telecom, Inc., which is the general partner and wholly-owned subsidiary of Sprint Nextel Corporation; UCOM, Inc., which is a limited partner; Utelcom, Inc., which is a limited partner; and Sprint International Communications Corporation, which is a limited partner. Sprint Nextel Corporation is a holding company which offers shares of stock to the public under the symbol "S". Only Sprint Nextel Corporation offers shares of stock on public markets. No person or entity owns more than ten percent of Sprint Nextel Corporation's stock.

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BRIEF OF SPRINT COMMUNICATIONS COMPANY L.P. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

Sprint Communications Company L.P. ("Sprint") respectfully submits this brief as *amicus curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

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[1] This brief is submitted on written consents of the parties, which were filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part, and no persons other than Sprint made a monetary contribution to the preparation of this brief. Sup. Ct. R. 37.6.

INTRODUCTION AND INTEREST OF SPRINT AS *AMICUS CURIAE*

Sprint is an interexchange carrier ("IXC") and provides telecommunications services nationwide. In § 276 of the Telecommunications Act of 1996, Congress directed the FCC to develop a regulatory plan that promotes competition for payphone services to the benefit of the general public. The FCC regulations at issue implement part of that mandate by establishing a compensation scheme for payphone service providers ("PSPs") when their payphones are used by consumers to place certain types of calls without using coins ("dial-around" or "coinless" toll-free calls). The FCC considered various regulatory options, including requiring callers to pay for use of the payphone equipment, as well as billing the parties who receive such calls ("called-parties"), similar to long distance "collect call" charges. Ultimately, the FCC chose for "administrative convenience" to require IXCs (like Sprint) and other carriers, known as switched-based resellers ("SBRs"), to pay the regulatory fee whenever their facilities are used in the path to transport and terminate coinless calls placed from a PSP's equipment.

The FCC has modified its payphone regulations several times, both in response to legal challenges and to address aspects of the compensation scheme that have proven unworkable. Although Sprint has complied with its duties under these various regulations, numerous PSPs have asserted claims for unpaid compensation against Sprint. These claims are primarily based on allegations that SBRs have failed to compensate PSPs for calls that the SBRs terminate. The PSPs have used ambiguities in the regulations (and their various iterations) to contend that Sprint should be responsible for compensating PSPs for these calls (in essence, as a "guarantor" of the SBRs). These claims involve proper interpretations of the FCC's various orders and complex, highly technical fact issues, including tracing hundreds of millions

of coinless calls over multiple networks involving potentially four or more carriers, determining if a particular call was "completed" and subject to the regulatory fee, and, if so, establishing the identity of the last IXC or SBR in the call path. The FCC has the expertise required to resolve these interpretative and technical issues; no court or jury is equipped to do so.

The question presented transcends the interests of the parties and is important to all PSPs, IXCs, SBRs, and the general public. Moreover, Sprint was an appellant in *APCC Services, Inc. v. Sprint Communications Co.*, 418 F.3d 1238 (D.C. Cir. 2005), *reh'g denied*, 04-7034, 2005 U.S. App. LEXIS 24402 (D.C. Cir. Nov. 10, 2005), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (05-766) ("*APCC*"). In *APCC*, Sprint argued—and the D.C. Circuit held—that Congress did not intend for violations of the FCC's payphone regulations to be privately enforceable under §§ 276, 201(b), 407, or 416(c) of the Communications Act. 418 F.3d at 1245-49. APCC sought review of that decision by this Court. The Court is holding consideration of APCC's petition and granted review only of the Ninth Circuit's ruling on the § 201(b) question, as presented by Petitioner here.

SUMMARY OF ARGUMENT

Section 276 was not enacted for the benefit of PSPs but rather to promote widespread competition for and deployment of payphone services to the benefit of the general public. The statute directs the FCC to establish a regulatory plan to accomplish these objectives. Nothing in the text or structure of § 276 indicates that Congress intended for this regulatory plan to be privately enforceable in court. Because congressional intent is determinative, the Ninth and D.C. Circuits correctly held in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003), and *APCC* respectively that there

is no private right of action for alleged violations of the FCC's payphone regulations.

In the present case, the Ninth Circuit inexplicably strayed from the text and structure of § 276 in holding that § 201(b) affords the basis for private enforcement of the payphone regulations through the right of action established in §§ 206 and 207 of the Act. This ruling cannot be squared with the Ninth Circuit's prior determination of the congressional intent in *Greene*, and improperly allows the more general statute, § 201(b), to displace the more specific one, § 276. Moreover, alleged violations of the payphone regulations bear no resemblance to the conduct that Congress proscribed in § 201(b). Although § 201(b) is broad, it only regulates the practices of a common carrier with respect to its customers (including other carriers). Section 201(b) does not apply to a common carrier's alleged failure to pay the regulatory fee for the public's use of payphone equipment, as established in the FCC's payphone regulations. Section 201(b), therefore, cannot serve as the basis for private parties to bring suit under §§ 206 and 207 for alleged violations of the regulations.

Finally, in *Greene*, the Ninth Circuit found that Congress did not intend to place interpretation and enforcement of the payphone regulations "'in the hands of private parties and some 700 federal district judges, instead of in the hands of the [FCC].'" 340 F.3d at 1053 (citation omitted). Payphone compensation disputes involve complex, highly-technical issues, including tracing hundreds of millions and sometimes billions of payphone calls to identify the different carriers in the call path and whether the call was completed (and hence compensable). Experience shows that the courts are not equipped to handle these cases, much less resolve them in a manner that promotes a coherent national regulatory policy. Past disputes that were improperly filed in the courts have been mired in litigation and required referral of multiple issues to the FCC for guidance. The FCC alone has the

expertise necessary to resolve such claims and has adjudicated numerous administrative complaint proceedings with relative efficiency. This further demonstrates that Congress could not possibly have intended for violations of the FCC's payphone regulations to be privately enforceable, as the Ninth Circuit originally—and correctly—determined in *Greene*.

ARGUMENT

A. Section 276 Directs The FCC To Develop A Coherent National Regulatory Plan For Payphones To The Benefit Of The General Public.

Section 276 of the Act is designed to promote "competition among payphone service providers [and] the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). The provision was enacted to address significant technological innovations that enabled (1) a vast array of *non*-carriers, like hotel, restaurant, truck-stop, gas station, and other commercial establishment owners, to provide payphones to the public in competition with the Bell Operating Companies ("BOCs"), which historically provided such equipment; and (2) users of this *non*-carrier payphone equipment to "dial-around" the coin requirements using credit cards, access codes, and other calling platforms. *See New England Pub. Comme'ns Council, Inc. v. FCC*, 334 F.3d 69, 71 (D.C. Cir. 2003) (discussing "dial-around" calls and advances in computer technology allowing new entrants to offer competitive payphone service) (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* ("*Payphone Docket*"), Notice of Proposed Rulemaking ("1996 NPRM"), 11 F.C.C.R. 6716, 6718-20 (1996) (¶¶ 2-6)).

The most relevant mandate of § 276 directs the FCC to "establish a per call compensation plan to ensure that all [PSPs] are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ." 47

U.S.C. § 276(b)(1)(A). Prior to this regulatory mandate, the BOCs had been able to recoup their investments in payphone equipment through the access charges they assessed against IXCs. Independent PSPs had no such mechanism. Congress wanted to level the playing field by establishing a non-discriminatory compensation scheme that encouraged further competitive investments in and deployment of payphone equipment and services. *Id.* § 276(a), (b)(1)(A)-(E). *See also* 1996 NPRM, 11 F.C.C.R. at 6718-20 (¶¶ 2-6) (describing objectives).[2]

Over the past decade, the FCC has considered various regulatory approaches to compensate PSPs for coinless calls and issued a series of orders attempting to implement the directive of § 276(b)(1)(A). *Payphone Docket*, Report & Order ("1996 Order"), 11 F.C.C.R. 20,541, 20,580-86 (¶¶ 77-87) (1996).[3] One approach would have required the *calling*

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[2] Dial-around or coinless calls traditionally have accounted for only a fraction of payphone usage. The regulatory compensation plan for coinless calls mandated in § 276(b)(1)(A) was, if anything, secondary to the principal requirements of § 276. The other provisions in § 276(a) and (b) direct the FCC to take a variety of steps to eliminate BOC payphone subsidies and to prohibit BOC discrimination in the provision of services to payphones, thereby spurring greater market-based competition for payphone equipment and services for all types of payphone calls.

[3] *See also Payphone Docket*, NPRM, 11 F.C.C.R. 6716 (1996); Report & Order, 11 F.C.C.R. 20,541 (1996); Order on Reconsideration, 11 F.C.C.R. 21,233 (1996), *aff'd in part and remanded in part sub nom. Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997); Second Report & Order, 13 F.C.C.R. 1778 (1997), *aff'd in part and remanded in part sub nom. MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report & Order and Order on Recons. of the Second Report & Order, 14 F.C.C.R. 2545 (1999), *aff'd sub nom. APCC v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); Second Order on Recons., 16 F.C.C.R. 8098 (2001); Third Order on Recons. and Order on Clarification, 16 F.C.C.R. 20,922 (2001), *remanded sub nom. Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); Fourth Order on Recons. and Order on Remand, 17 F.C.C.R. 2020

party to deposit coins into the payphone before placing a call. 1996 NPRM, 11 F.C.C.R. at 6730 (¶ 27). Another approach would have charged the *called party* a "set use" fee for the payphone call, which would have been billed and collected by IXCs on a monthly basis (much like a collect call). *Id.* at 6729-30 (¶ 26). The FCC concluded that either of these approaches would satisfy § 276(b)(1)(A)'s mandate, but ultimately determined that it would be more administratively efficient to adopt a "carrier-pays" approach, under which the IXC or SBR that "terminates" the payphone call compensates the PSPs. 1996 Order, 11 F.C.C.R. at 20,586 (¶ 86); *Payphone Docket*, Order on Recons., 11 F.C.C.R. 21,233, 21,277 (¶ 92) (1996). The FCC found this approach "preferable because it would result in less transaction costs because the toll-carrier could aggregate its payments to [PSPs, whereas] [u]nder a set use fee . . . these payments would be spread among a vast number of payphone callers through their individual telephone bills." 1996 Order, 11 F.C.C.R. at 20,580 (¶ 77).

In 1999, the FCC issued another order establishing the compensation rate for the "carrier-pays" approach outlined in its 1996 Order. *Payphone Docket*, Third Report & Order and Order on Recons. of Second Report & Order ("1999 Order"), 14 F.C.C.R. 2545, 2553-54 (¶ 18), 2597-98 (¶¶ 115-116) (1999). The 1999 Order proved to be unworkable in several respects. Most notably, PSPs claimed that they were not receiving compensation for certain dial-around calls handled by SBRs.

(2002); Fifth Order on Recons. and Order on Remand, 17 F.C.C.R. 21,274 (2002), *aff'd sub nom. AT&T v. FCC*, 363 F.3d 504 (D.C. Cir. 2004); Report & Order, 18 F.C.C.R. 19,975 (2003); *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir.), *reh'g denied*, No. 04-7034, 2005 U.S. App. LEXIS 24402 (D.C. Cir. Nov. 10, 2005), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (05-766).

Responding to these complaints in 2001, the FCC concluded that the 1999 Order "ha[d] not had the intended effect of ensuring that PSPs receive compensation for each and every completed, coinless payphone call." *Payphone Docket*, Second Order on Recons. ("2001 Order"), 16 F.C.C.R. 8098, 8103 (¶ 10) (2001). To address these problems, the FCC substantively modified its payphone compensation plan to require the first IXC in the call path to compensate the PSP for a completed coinless call, even if the call was ultimately terminated by a SBR. *Id.* (¶ 11). The IXCs were then assigned responsibility for seeking reimbursement from the SBRs. *Id.* The FCC posited that this new plan should "address the difficulty which PSPs face in obtaining compensation for coinless calls placed from payphones which involve a [SBR] in the call path," and thus "remedy this failure in the [original] compensation regime" established in the 1999 Order. *Id.* at 8098 (¶ 1), 8103 (¶ 10).

The 2001 Order was vacated by the D.C. Circuit, which held that the FCC had promulgated the new compensation plan without proper notice and comment, in violation of the Administrative Procedure Act ("APA"). *Sprint Corp. v. FCC*, 315 F.3d 369, 372, 377 (D.C. Cir. 2003). On remand, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on whether the compensation plan adopted in the 2001 Order or another compensation plan would better satisfy the objectives of § 276. *Payphone Docket*, Further Notice of Proposed Rulemaking ("2003 NPRM"), 18 F.C.C.R. 11,003, 11,005 (¶ 3) (2003).

In October 2003, the FCC issued its third payphone compensation plan. *Payphone Docket*, Report & Order ("2003 Order"), 18 F.C.C.R. 19,975 (2003). The 2003 Order "squarely" places responsibility for payphone compensation on the carrier who terminates completed dial-around calls, whether the carrier is an IXC or a SBR. *Id.* at 19,986 (¶ 24). The 2003 Order also imposes new call-tracking and reporting

obligations to reduce compensation disputes. In announcing this newest plan, the FCC stated that it was "guided by [its] practical expertise in overseeing the various compensation regimes [the agency] implemented since of the adoption of section 276 in the 1996 Act." *Id.* at 19,987 (¶ 26). Because the 2001 Order "did not optimally ensure fair compensation, we are adopting new rules today to replace it." *Id.* at 19,984 (¶ 20).

The FCC has also established detailed administrative complaint procedures for PSPs and IXCs to resolve payphone compensation disputes. 1996 Order, 11 F.C.C.R. at 20,569-73 (¶¶ 55-61). The 1996 Order instructs PSPs to file complaints with the FCC; explains when particular claims are ripe for agency adjudication (*e.g.*, only after a required call "verification" process); provides "timeliness" defenses (*i.e.*, for claims submitted more than a year after a payment period); and establishes when the federal limitations period for compensation claims commences. *Id.* at 20,597-98 (¶¶ 112-114). The FCC has committed "aggressively [to] take action on such complaints." *Id.* at 20,598 (¶ 114). And numerous PSPs have availed themselves of these administrative complaint procedures in seeking alleged underpayments of payphone compensation from IXCs and SBRs. *See, e.g., APCC Servs., Inc. v. Network IP, LLC*, 20 F.C.C.R. 2073 (2005) ("*Network IP*"); *APCC Servs., Inc. v. TS Interactive, Inc.*, 19 F.C.C.R. 10,456 (2004); *Bell Atl.-Del., Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15,918 (2002).

B. Congress Did Not Intend For The § 276 Payphone Compensation Scheme To Be Privately Enforceable.

Whether Congress intended for the FCC's payphone regulations to be privately enforceable is answered by § 276. In *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001), this Court held that the "touchstone" in determining whether a statute

provides a private right of action is congressional intent. "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87. The search for congressional intent, therefore, begins and ends with the statutory "text and structure." *Id.* at 288. The "contemporary legal context" in which a statute was enacted is relevant "only to the extent it clarifies text." *Id. Accord Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) (holding that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or an implied right of action").

Consistent with these principles, *Sandoval* further instructs that Congress alone can authorize private enforcement of federal regulations. Thus, where a regulation constitutes an "authoritative interpretation" of a statute that is subject to a private action, violation of the regulation equates to a violation of the statute and may be privately enforceable. As this Court explained, "[s]uch regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." *Sandoval*, 532 U.S. at 284. Alternatively, "when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable." *Id.* at 291. Apart from these two circumstances, "it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.*

In *Greene* and *APCC*, the Ninth and D.C. Circuits respectively held that Congress did not intend to create a private right of action to enforce the FCC's payphone regulations. Both courts examined the text and structure of § 276 to ascertain congressional intent, and found no rights-creating language that might possibly confer a private remedy for PSPs against IXCs. Section 276(b)(1) is part of a larger, comprehensive restructuring of the regulatory regime governing payphones. *Cf. New England*, 334 F.3d at 75-76 (noting that the provision is one of several measures intended to implement the "anti-subsidy and anti-discrimination mandates" of Congress). The provision contains no preconception as to how the regulatory scheme should be implemented and imposes no obligations or duties on any private person or entity. It simply directs the FCC to prescribe a new regulatory plan for all completed intrastate and interstate calls originating from payphones. 47 U.S.C. § 276(b)(1)(A). The FCC could have determined to assess the regulatory fee on the callers who use payphones or on the parties they call. 1996 NPRM, 11 F.C.C.R. at 6729 (¶ 24). *See also Greene*, 340 F.3d at 1051 (noting that the FCC could have assigned payment obligations to different entities under the regulatory plan). Although the FCC ultimately determined to assess the regulatory fee on IXCs and SBRs as a matter of "administrative convenience," nothing prevents the FCC from amending its payphone compensation rules to reassign these obligations to different parties, including payphone users or called parties. *See, e.g.*, 1999 Order, 14 F.C.C.R. at 2598 (¶ 116).

Because § 276 leaves development of the compensation plan to regulatory choice, there is no basis to infer (much less unmistakable evidence) that Congress intended for violations of the payphone regulations to be enforceable under the private right of action established in §§ 206 and 207. These provisions only afford a private remedy for damages resulting from a common carrier's alleged violations *of the Act*. 47 U.S.C. §§ 206, 207. Had Congress intended for this private

remedy to apply, it would have written § 276(b)(1)(A) differently and assigned the duty to compensate PSPs for coinless calls on IXCs and SBRs. Indeed, in other parts of § 276, Congress imposed specific duties and prohibitions on the BOCs, making clear its intent that violations of these statutory obligations by the BOCs would be subject to the §§ 206/207 private right of action. *See, e.g.*, 47 U.S.C. § 276(a)(1)-(2). But as the D.C. Circuit correctly observed, "[n]othing in the statute requires the [FCC] to designate the IXC as the party responsible for dial-around payment." *APCC*, 418 F.3d at 1246. The Ninth Circuit similarly held in *Greene* that, "[b]ecause the private right of action created by §§ 206 and 207 extends only to violations of 'this chapter,' and § 276 does not require IXCs to compensate PSPs, there is no 'violation' of § 276 for which a private action explicitly lies for payphone compensation." 340 F.3d at 1050-51.

The D.C. and Ninth Circuits also properly declined to afford *Chevron* deference to the FCC's interpretation of § 276 in the 1999 Order. *Chevron* deference only applies when a statute is ambiguous and the agency's interpretation of it is reasonable. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). The D.C. Circuit acknowledged that the FCC "mentioned [§ 276] throughout [the 1999 Order] as the source of its authority" to implement a payphone compensation plan. *APCC*, 418 F.3d at 1247. But, as the D.C. Circuit further recognized, whether a statute is a source of authority for regulatory action and whether the statute creates a private right of action for violations of agency regulations are two different matters. In light of *Sandoval*, the D.C. Circuit looked to the text and structure of the Act "to determine whether [the statute] displays an intent to create *not just* a private right *but also* a private remedy." *Id.* at 1245 (applying *Sandoval*, 532 U.S. at 286-87 (emphasis added)). Having determined that § 276 is unambiguously directed to the FCC, and does not address the rights or obligations of any private parties, the D.C. Circuit correctly

declined to afford *Chevron* deference to the FCC's notion that IXCs can "violate" the statute. "Because the IXCs are not regulated by § 276, there is no way in which they could have violated that provision." *Id.* at 1247.

There is likewise no basis to infer that Congress intended a private remedy for alleged violations of the FCC's payphone regulations. Section 276(b)(1)(A) contains no such authority; nor do §§ 206 and 207. *Greene*, 340 F.3d at 1050-51 (§§ 206 and 207 do not authorize private enforcement of FCC regulations). *See also Conboy v. AT&T Corp.*, 84 F. Supp. 2d 492, 500 (S.D.N.Y. 2000), *aff'd*, 241 F.3d 242, 248-51 (2d Cir. 2001) (a party seeking relief under §§ 206 and 207 must allege and p[illegible]e damages resulting from a carrier's violation of a specific [illegible]ovision of the Act, not a violation of FCC regulations). As the Ninth Circuit explained in *Greene*, had Congress intended to create a private right of action for violations of the payphone regulations:

> It could easily have done so, as indeed it did elsewhere in the Act. Section 227, for example, authorizes an action for violation of the section "or the regulations prescribed under this subsection." 47 U.S.C. § 227(b)(3)(A). We decline to attribute a similar intent to the regulations prescribed by § 276 given that Congress knew how to create a private action for violating a regulation when it wanted to, yet did not include an action for violating the regulations contemplated by § 276 in the text of § 276, § 206, or § 207.

340 F.3d at 1051.

The text and structure of § 276, therefore, provide no indication that Congress intended to create new individual rights, much less to create a new private right of action. Accordingly, there is no basis for a private suit to enforce the FCC's payphone regulations. The lack of congressional intent in § 276 settles the matter.

C. Section 201(b) Does Not Apply To A Violation Of The Payphone Rules.

The Ninth Circuit improperly strayed from the text and structure of § 276 in accepting the argument of Respondent (and the FCC, as *amicus curiae*) that a violation of the FCC's payphone regulations constitutes an "unjust" and "unreasonable" practice under § 201(b), redressable under the §§ 206/207 private right of action. This determination cannot be squared with the Ninth Circuit's own ruling in *Greene* that Congress did not intend to provide a private remedy for violations of the regulations. As the D.C. Circuit correctly noted, § 201(b) is the more general provision, § 276 the more specific. Absent clear evidence that Congress intended a different result, the specific provision must control. *APCC*, 418 F.3d at 1247. *See also Morales v. TWA, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). Disregard of this principle is particularly improper here because, as the D.C. Circuit found, it would transform § 201(b) into a "catchall provision, converting any common carrier's violation of a [FCC] order or regulation into a violation of the Act actionable in federal court." *APCC*, 418 F.3d at 1247.

Nor can the FCC's mere assertion that a violation of its regulations constitutes a violation of § 201(b) be fairly viewed as an "authoritative interpretation" of the statute. The FCC only made this claim after *Greene*, in a single, unexplained sentence of its 2003 Order. In the D.C. Circuit's words, the FCC's belated reference to § 201(b) reflects nothing more than an attempt "to manufacture" a private right of action that Congress did not intend. *Id.*

Indeed, an IXC's alleged failure to pay the regulatory fee established in the payphone regulations bears no resemblance to the conduct that Congress intended to proscribe in § 201(b). In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994), this Court

held that a party may not bring suit against a defendant for acts that are not prohibited by the text of the statute which provides a private right of action. The Court rejected use of the implied private right of action under Rule 10b-5 for alleged aiding and abetting of violations of § 10(b), observing that "'§ 10(b) is aptly described as a catchall provision, but what it catches must be fraud.'" *Id.* at 174 (citation omitted). Because nothing in the text or structure of § 10(b) evinces a congressional intent to proscribe aiding and abetting, the Court held that the statute could not be used as a basis for private suits alleging such conduct. *Id.* at 173.

These same principles preclude use of § 201(b) to supply a private remedy for violations of the FCC's payphone regulations. Section 201(b) generally requires that "[a]ll charges, practices, classifications, and regulations" of a common carrier in the provision of communications services to the public must be "just and reasonable." 47 U.S.C. § 201(b). Although the provision is broad, it only regulates the practices of a carrier with respect to its own *customers*. The statutory text cannot be stretched to encompass any and all conduct of a common carrier that the FCC might choose to describe as "unjust" or "unreasonable."

An alleged failure to pay the regulatory fee established in the payphone regulations falls far outside the scope of conduct that Congress prohibited in § 201(b). Section 276 was enacted to address significant technological innovations that have enabled a vast array of *non*-carriers to provide payphone equipment to the public, in competition with the BOCs. *See New England*, 334 F.3d at 71. Congress intended for the regulatory scheme mandated in § 276 to encourage these industry developments by, *inter alia*, establishing a nondiscriminatory mechanism to compensate PSPs for their investments in payphone equipment and services. 47 U.S.C. § 276(b)(1). This congressional objective bears no relation to § 201(b)'s "just and reasonable" standard, which predates

§ 276 and is intended to govern common carrier-customer practices. As the D.C. Circuit noted, the FCC could have required callers, called parties, or others to pay the regulatory fee for use of the payphone equipment. *APCC*, 418 F.3d at 1246. The fact that the FCC decided to impose the regulatory fee on IXCs, for administrative convenience, does not transform the fee into a common carrier "practice" relating to *its* offering of a "communication service" to its customers. Indeed, in many instances, the payphone regulations obligate IXCs to pay the "fee" for *other carriers* (*i.e.*, switchless resellers), when a coinless payphone call terminates over the resellers' services, and then seek reimbursement from these other carriers. 2003 Order, 18 F.C.C.R. at 19,978 (¶ 7 & n.16).

The FCC has cited to various case and agency authorities to support its unexplained and unprincipled "interpretation" of § 201(b). But these authorities only further demonstrate that the scope of conduct prohibited by the statute does not extend to alleged violations of the payphone regulations.

For example, in *APCC*, the FCC relied on *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995), which involved a rate-of-return established by the FCC pursuant to § 205. Section 205 authorizes the agency to prescribe "just and reasonable" rates or practices and makes it unlawful for a common carrier to fail to comply with them. 47 U.S.C. § 205; *see also New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1104 (D.C. Cir. 1987) (describing the FCC's § 205 authority). In *MCI*, some local exchange carriers ("LECs") had charged IXCs rates exceeding the FCC's prescribed rate-of-return. 59 F.3d at 1410. The LECs argued that their excess earnings only violated the FCC's rate-of-return regulations, not the Act. The D.C. Circuit rejected that argument, holding that a LEC's failure to comply with the prescribed "just and reasonable" rate constituted a violation of § 205, and hence a per se violation of § 201(b) subject to the §§ 206/207 private right of action. *Id.* at 1414.

In *APCC*, the FCC attempted to analogize the LECs' violation of the FCC prescribed rate in *MCI* to an IXC's alleged failure to pay the regulatory fee established in the payphone regulations, arguing that both instances involved "'a rather large area for the free play of agency discretion'" to determine what is "'just and reasonable.'" FCC Br. 11 (citation omitted). But the illogic of this argument is shown by the remedy that Congress provided to the FCC for § 201(b) violations; namely, to prescribe a "just and reasonable" rate or practice under § 205, which would then have the "force of a statute" under the Act. The payphone regulations were not promulgated under § 205, but rather implement the directive contained in § 276(b)(1)(A). Whereas Congress imposed a duty on common carriers to comply with FCC-prescribed rates and practices under § 205, it did not impose any duty on IXCs to pay compensation under § 276(b)(1)(A). And, unlike § 205, nothing in § 276(b)(1)(A) gives the compensation plan prescribed by the FCC the force of a statute or otherwise makes noncompliance with it a violation of the Act. *Greene*, 340 F.3d at 1052.

The FCC also cited to *Ascom Communications v. Sprint Communications Co. L.P.*, 15 F.C.C.R. 3223 (2000). *Ascom* involved disputed charges Sprint collected from a customer, Ascom, under a tariff. Calls from Ascom's payphone network were to be aggregated and delivered to Sprint's network. Sprint billed Ascom for some calls that turned out to be fraudulent, including ones that did not originate from Ascom's network. Ascom brought suit claiming that Sprint's billing of calls for which Ascom was not *a customer of Sprint* was an "unjust and unreasonable" practice. *Id.* at 3226 (¶ 7). Nothing in *Ascom* supports the proposition that noncompliance with the payphone regulations violates a common carrier's duties under § 201(b).

Similarly, during oral argument in *APCC*, counsel for the FCC referred to several agency orders finding certain

common carrier practices "unjust and unreasonable" under § 201(b). Each of these orders again involved challenges to the reasonableness of a common carrier's rates, charges, or practices in connection with the offering of (or refusal to offer) a communications service to a customer, either an end user or another common carrier. In five of the orders, the FCC's (or Enforcement Bureau's) § 201(b) determinations were statutorily grounded on express duties imposed by Congress on common carriers under the Act.[4] In the remaining order, the pertinent duty was imposed by the FCC pursuant to

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[4] *See Telephone Number Portability*, 18 F.C.C.R. 23,697, 23,709 (¶ 29 n.76) (2003) ("anticipat[ing]" that a common carrier's failure to port telephone numbers of customers, as required under § 251(b), would violate the agency's number portability rules and constitute an unjust and unreasonable practice under § 201(b)); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,341-42 (¶ 577) (2003) (finding that certain access requirements imposed by incumbent local exchange carriers in providing network elements to requesting competitive local exchange carriers ("CLECs") would constitute an unjust and unreasonable practice under § 201(b)); *NOS Commc'ns, Inc.*, 18 F.C.C.R. 6952, 6961-62 (¶ 15) (2003) (on order to show cause, the FCC preliminarily (1) found that a common carrier induced customers to switch long distance service provider through a false and misleading marketing campaign and (2) issued an order to show cause why the carrier should not be decertified under § 214); *Himmelman v. MCI Commc'ns Corp.*, 17 F.C.C.R. 5504, 5508 (¶ 12), 5509-10 (¶ 16 n.54) (2002) (finding, on a primary jurisdiction referral, that "[a]lthough the Act did not require [the common carriers] to offer two listings per [directory assistance] call, they chose to do so through their tariffs [and o]nce these offers were made, they were obligated to provide the listings in a just and reasonable manner [pursuant to § 201(b)]"; the FCC forbore from prescribing "a specific method of disclosure" to such customers); *Staton Holdings, Inc. v. MCI WorldCom Commc'ns, Inc.*, 19 F.C.C.R. 8699 (2004) (determination by the FCC's Enforcement Bureau that a common carrier negligently disconnected and transferred rights to customer's toll-free vanity number in violation of § 201(b)).

an express grant of authority by Congress under § 214(c) to impose such obligations on a common carrier.[5]

The six orders are reflective of the type of practices that § 201(b) is intended to cover. They do not support the proposition that the FCC may proclaim by order that conduct of a common carrier is "unjust and unreasonable" under § 201(b), thereby triggering the §§ 206/207 private right of action, regardless whether such conduct relates to a common carrier's offering of services to its customers, including other common carriers. As the D.C. Circuit correctly observed, such a result "is not plainly evident from the text of [§ 201(b)], and nothing suggests that Congress intended its words to have such a sweeping effect." *APCC*, 418 F.3d at 1247.

Indeed, under the theory urged by the FCC and Respondent, any violation of any FCC regulation by a common carrier could be classified as an "unreasonable practice" under § 201(b) subject to the §§ 206/207 private action. In addition to stretching § 201(b) far beyond the conduct proscribed by Congress, such an unprincipled result cannot be reconciled with §§ 206 and 207, which expressly limit the private right of action against common carriers to violations *of the Act*. *Greene*, 340 F.3d at 1051; *see also Conboy*, 84 F. Supp. 2d at 500. And, as previously shown, Congress knows how to create a private right of action for agency regulations when that is its intention. *See, e.g.*, 47 U.S.C. § 227; *cf. Greene*, 340 F.3d at 1051 (such provisions show Congress knows how to create a private remedy for violation of FCC regulations).

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[5] *CoreComm Comme'ns, Inc. v. SBC Comme'ns Inc.*, 18 F.C.C.R. 7568 (2003) (common carrier violated express condition to merger, imposed by FCC pursuant to its express authority under § 214(c), by refusing to permit CLECs to use UNEs to transport intraLATA toll traffic).

D. Congress Expected The FCC—Not The Courts—To Administer And Enforce The Payphone Regulations.

In *Greene*, the Ninth Circuit properly found that Congress did not intend to place interpretation and enforcement of the payphone regulations "'in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission.'" *Greene*, 340 F.3d at 1053 (citation omitted). By interpreting § 201(b) to encompass violations of the payphone regulations, the Ninth Circuit's ruling in this case improperly permits an "end run" around the regulatory plan contemplated under § 276. The courts are ill-suited to handle the complex, highly-technical issues presented in such cases. If allowed to stand, the ruling will impede the development of a coherent national regulatory policy, undermine the congressional objectives of § 276, and harm the public interest.

There are numerous examples of payphone compensation disputes that demonstrate these points. For example, in December 1998, Phone-Tel Communications, Inc., a PSP, filed a putative class action against Sprint, AT&T, and WorldCom on behalf of all PSPs nationwide, excluding LECs. *Phone-Tel Commc'ns, Inc. v. AT&T Corp., et al.*, Civil Action No. 98-CV-6486 (E.D. Pa.) ("*Pennsylvania Action*"). The *Pennsylvania Action*, like the *APCC* case, alleged that Sprint and the other IXC-defendants violated the payphone regulations by failing to compensate the PSPs "for each and every" completed payphone call. *Pennsylvania Action*, Compl. ¶ 47. In June 2000, the district court issued an order staying the action and referring four issues to the FCC on primary jurisdiction grounds. The court "conclude[d] that . . . plaintiff's claim raises certain technical and policy issues within the special competence of the FCC . . . ." *Phone-Tel Commc'ns, Inc. v. AT&T Corp.*, 100 F. Supp. 2d 313, 315 (E.D. Pa. 2000). For example, "[e]stablishing defendants' obligation to compensate plaintiff where defen-

dants are unable to determine whether a call originates from a payphone requires an interpretation of the FCC's order instructing LEC's to implement FLEX-ANI technology." *Id.* at 318. "For the court to divine a definition of a 'completed' call without an informed appreciation of the technology needed to implement it in the first place would be an empty gesture." *Id.* at 321. The court similarly required guidance on determining: (1) when a coinless call is "completed" for compensation purposes; (2) the proper per call compensation rates during different time periods due to changes in the FCC regulations; and (3) who bears responsibility for compensating a PSP for calls initially carried on the first facilities-based carrier's network but subsequently transferred to other carriers, including SBRs, during the call path. *Id.* at 322.

In October 1999, two PSPs, Flying J, Inc. and TON Services, Inc., filed a different suit against Sprint, which was one of a series of suits they brought against carriers alleging failure to pay the regulatory fee established in the payphone regulations for coinless calls placed from payphone equipment at their truck-stop facilities. *Flying J, Inc., et al. v. Sprint Commc'ns Co. L.P.*, Civil Action No. 1:99-CV-111-ST (D. Utah) ("*Utah Action*"). In January 2000, the court referred four issues to the FCC on primary jurisdiction grounds. The court held that referral to the FCC was necessary because the agency alone had the requisite expertise and resources to resolve the issues and to ensure uniformity in the regulation of PSP compensation. *Utah Action*, Order . . . Granting in Part & Denying in Part Sprint Communications' Mot. to Dismiss or, in the Alternative, to Stay on the Basis of Primary Jurisdiction & Granting Sprint Communications' Mot. to Dismiss Plaintiffs' Claim for Punitive Damages at 10 (Jan. 10, 2000). Among the referred issues were determining: (1) when SBRs become responsible for the regulatory fee when there are multiple carriers in the call path; (2) the proper retroactive adjustment or "true up" of payments due to changes in the FCC's regulations; (3) how set-offs should be

made for overpayments of the fee; and (4) the proper fees for "interim" periods. *Id.* at 9-10.

The experiences of the district court and the parties in a case that APCC brought against AT&T are similarly probative. *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101 (D.D.C. 2003), *rev'd, APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (05-766). The case was filed in early 1999 (and preceded APCC's companion case against Sprint). Although the district court refused to make a primary jurisdiction referral to the FCC, the court and the parties soon confronted vexing difficulties in trying to conduct even basic discovery on the PSP's compensation claims. In May 2001, the court appointed a special master to assist with the effort. But by the time the case was certified to the D.C. Circuit for interlocutory appeal (along with Sprint's case) in December 2003, the docket already contained more than 110 entries and was still bogged down in burdensome and expensive discovery with no end in sight. As the district court described in its certification order:

> The cost of discovery related to the telephone calls alone will exceed any possible damages award, because "there are likely over *one billion* separate calls to argue about here." (AT&T's Mot. at 15.) In fact, the parties have already expended a substantial amount of resources attempting to design acceptable protocols to analyze a selected 2000 phone calls and have spent more than $1 million relating to document discovery. (*See* AT&T's Mot. at 19; AT&T's Reply at 11 n.5.) And, although significant efforts have been made to gather discovery, AT&T claims that because of the sheer volume of information involved, neither plaintiffs nor the carriers have any rational basis upon which to evaluate possible settlement—*more than four years after the filing of the suit*. (*See* AT&T's Mot. at 16.)

Id. at 109 (emphasis in original). The D.C. Circuit was thus right, in its ruling on the interlocutory appeal, to express

concern about the "potential consequences to judicial dockets" if the FCC and other federal agencies were free to declare, based on general liability provisions like § 201(b), that violations of their regulations should be privately enforceable. *APCC*, 418 F.3d at 1248.

In contrast to the mired litigations in the courts, numerous PSPs have used the FCC's administrative complaint procedures to seek alleged underpayments of payphone compensation from IXCs and SBRs. *See, e.g., APCC Servs., Inc. v. Network IP, LLC*, 20 F.C.C.R. 2073 (2005) (holding defendants liable for compensation required under the payphone regulations) (heard and resolved within two years and eight months); *APCC Servs., Inc. v. TS Interactive, Inc.*, 19 F.C.C.R. 10,456 (2004) (awarding approximately $545,000 plus interest for unpaid compensation) (heard and resolved within two years and one month); *Bell Atl.-Del., Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15,918 (2002) (determining that IXCs were not required to pay compensation to PSPs for payphone calls terminated by SBRs) (heard and resolved in seven months). The agency's orders in these administrative proceedings again demonstrate the complexity of the factual and legal issues presented by payphone compensation disputes, including the difficulties in tracking payphone calls to completion, in reconciling the different payment responsibilities established under various iterations of the regulations, and in properly interpreting key aspects of the regulatory scheme.[6] As the expert agency, the FCC is uniquely suited

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[6] *See, e.g., Network IP*, 20 F.C.C.R. at 2075 (¶ 5) ("Complicating the [FCC] task . . . is the fact that several entities may be involved, in one way or another, in a particular coinless payphone call."); 2076 (¶ 7) ("with respect to each coinless payphone call, there may be *two* daisy-chains of carriers . . . [a]nd each of these chains can be lengthy") (emphasis in original); *id.* (¶ 8) ("Faced with this complex array, the [FCC has] had a number of options in establishing a [compensation] plan . . . . During the Relevant Period, the [FCC] chose the following plan . . . ."); 2080-81

to resolve such claims and has been able to do so with relative efficiency.

These representative cases further demonstrate that Congress could not have possibly intended for violations of the FCC's payphone regulations to be privately enforceable in court. The FCC alone has the expertise and capability of resolving these types of claims in an efficient manner and, as the Ninth Circuit correctly held in *Greene*, Congress expected the agency—not the courts—to address alleged violations of the payphone regulations as part of the development of a coherent national communications regulatory policy. *Greene*, 340 F.3d at 1053.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's ruling on the question presented.

Respectfully submitted,

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(¶¶ 17-19) (addressing competing interpretations of "facilities-based" carrier under the rules).